52349

SALLY A. KOCIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY,
	)	
vs.	)	FIRST MUNICIPAL DISTRICT.
	)	
VALENTINE W. KOCIS,	)	Honorable Dwight McKay,
	)	Magistrate, presiding.
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This was an action brought by plaintiff, Sally A. Kocis, to recover the face value of an Appeal Bond filed in the court below from the entry therein of a certain decree of separate maintenance in plaintiff's favor and operating as a supersedeas pending an appeal taken to our reviewing court under case No. 49199. Defendant, Valentine W. Kocis, not a party to that original cause, as surety on the bond, appeals from the entry of a judgment by the lower court in favor of plaintiff in the principal sum of $1,000.00, the maximum limit of defendant's liability under its terms.

Briefly, the circumstances of the instant case as they appear from the pleadings and arguments advanced are that in March 1963, plaintiff was granted a default decree for separate maintenance from her husband, Theodore Kocis (not a party to this appeal), by the terms of which decree the defendant therein was ordered to pay to plaintiff $35.00 per week in alimony and child support, together with the combined sum of $600.00 as attorney's fees. Theodore Kocis thereafter initiated post-judgment proceedings to vacate that decree, which application was denied by the trial court, and from which denial he prosecuted an unsuccessful appeal to our reviewing court. See Kocis v. Kocis, 47 Ill.App.2d 68, 197 N.E.2d 460 (1964). In the interim however, upon terms fixed by the trial court, the Appeal Bond in question was directed to be executed and approved on

April 4, 1963, the instant defendant as signatory thereto agreeing to stand surety for Theodore Kocis and severally obligating himself, " . . . to pay to the above judgment creditor [plaintiff] any part of the judgment which is not reversed, and interest, damages and costs." The obligation itself was limited in amount to $1,000.00.

No further action in relief of the adverse judgment was pursued by the husband, the Appellate Court Mandate issuing accordingly to the trial court, which in May 1964, on motion of plaintiff, entered a supplemental order directing Theodore Kocis to remit to plaintiff an additional sum in excess of $1,200.00 for certain intervening medical expenses and costs of her attorney's fees in defense of the appeal. Thereafter in August 1964, on motion of plaintiff for a rule to show cause, a writ of body attachment issued for Theodore Kocis for his wilful failure to comply with the previous orders of the court. No finding as to the specific amount in arrears, however, was entered. It has been indicated to the court in this regard by the respective counsel on appeal that said defendant had removed himself from and remains without the jurisdiction of this State. Counsel for the instant defendant further acknowledges that the extent of Theodore Kocis' compliance with the earlier orders of the court below has been by his payment of six or seven $20.00 checks, to plaintiff, during the pendency of his appeal from the separate maintenance decree.

As an unsatisfied judgment creditor, plaintiff instituted this present proceeding in the Circuit Court of Cook County, First Municipal District on September 13, 1965 to recover, in full, the face amount on the aforesaid Appeal Bond (attached as Exhibit A to her complaint). On the court's own motion, plaintiff subsequently filed a verified bill of particulars setting forth as elements of damages, among other delinquent amounts,

in excess of 50 weeks arrearages in alimony and child support payments. Defendant, by his answer, did not deny that, in fact, some monies were due and owing plaintiff. Rather, defendant sought thereby to contest the jurisdiction of a law court to adjudicate a matter peculiar to Chancery-Divorce proceedings. More specifically, defendant averred that plaintiff's independent action on the bond to recover those monies requires that she first reduce to judgment the delinquent amount to a sum certain or ascertainable by the proper forum, and that the only sum recoverable by her law action was $83.46, as costs of her appearance fee and preparation of an additional abstract of record in the original appeal. This, in essence, is the same theory adhered to by defendant on appeal on the instant case.

To this pleading plaintiff made no response, the court below on November 15, 1966, upon motion of defendant, entering a judgment on the pleadings in favor of plaintiff in the limited sum of $83.46. Within thirty days, however, plaintiff filed a motion to vacate that order and for a judgment in full on the Appeal Bond, citing to the court its erroneous interpretation of the language of the Chancery decree. We might interject that the complete file from the former separate maintenance proceeding was before the court in this regard by means of judicial notice of the contents thereof. After a full hearing on said motion, a report of proceedings of which has not been preserved for the record on appeal, the court below set aside its previous judgment, entering judgment in plaintiff's favor for $1,000.00. Defendant subsequently filed a motion to vacate that latter judgment, which motion was denied, and from which denial he brings this appeal.

Defendant, with citation of authority, initially raises objection to having been denied his statutory right to seasonably move for a judgment on the pleadings pursuant to Section

45(5) of our Practice Act by the court's unwarranted reversal of position. He alludes further to Section 40(2) of that Act to demonstrate to this court that he was entitled to such a judgment by virtue of plaintiff's failure to reply to the affirmative allegations of his answer. With that proposition we cannot agree. Stripped of its legal conclusions and argumentative matter, defendant's answer amounts to nothing more than a simple denial of plaintiff's allegation of damages to which no reply, of course, need be made. Ill.Rev.Stat.(1965) Chap.110, par.40(2). Simply stated, there exists no rule of practice which requires a party to deny his opponent's denial of measure of damages under threat of an adverse judgment on the pleadings. Snyder v. Robert A. Black, Inc., 53 Ill.App.2d 327, 203 N.E.2d 1 (1964). To the contrary, the answer at bar operated to crystalize and join in issue the measure of damages which, in actuality, is the extent of the error interposed by defendant on this appeal.

It is not disputed that Theodore Kocis was in substantial arrears in payment to plaintiff as of the date of the commencement of this action, nor that remuneration for her attorney's fees as assessed in the decree has not been met. Rather, defendant endeavors to thwart the otherwise unambiguous terms of his obligation on the bond by claim to the improper choice of forums. Such an argument has no merit.

While it is apparent that defendant's objection is correct to the extent that costs taxed to Theodore Kocis by the trial court subsequent to the disposition of his appeal are not chargeable to the surety on the Appeal Bond, Matarrese v. Monaco, 274 Ill.App. 457 (1934), defendant has offered no basis upon which we could resolve the question of measure of damages in his favor; to wit, a sum less than $1,000.00. This was a question properly presented to the trial court on plaintiff's motion to vacate and

for judgment in full. That court had before it, by judicial notice, the findings and judgment of the Chancery Court in the separate maintenance action, and upon which it is not denied a full hearing was afforded. Defendant has failed to preserve for review any Report of Proceedings or its equivalent from that hearing and yet purports to now challenge the question of that court's finding as to damages, as an issue of fact, in this tribunal. Such an approach cannot be countenanced.

The absence of such a transcript in the record at bar notwithstanding the judgment entered below is readily sustained at least to the extent of $683.46, that figure representing sums either liquidated and certain in the decree or admitted by defendant's answer as the case may be. They are sums, moreover, within the realm of defendant's obligation on the bond, and of which we must presume the trial court was cognizant in entering its judgment for $1,000.00.

As to the balance or deficit, the argument assailing the propriety of contesting its amount in an action at law on the underlying Appeal Bond cannot be heard to obtain. Absent a Report of Proceedings or Statement of Facts as required by Supreme Court Rule 36(1)(c)(d), [Ill.Rev.Stat.(1965) Chap.110, par.101.36(1)(c)(d)], where, as here, the judgment order appealed from recites, "and the Court being fully advised in the premises," the presumption is, unless the contrary is shown, that the trial judge heard sufficient evidence and argument to support the judgment entered. Vrandack v. Vrandack, 82 Ill.App.2d 339, 226 N.E.2d 391 (1967). It is a presumption which has not been overcome by defendant's briefs and argument on appeal, such contentions serving to buttress the conclusion that the party for whom defendant agreed to stand surety was delinquent in his liability under the decree for a sum far in excess of the judgment entered.

For the above reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

95 Ill. App. 2nd 313

52219

CITY OF CHICAGO, a Municipal Corporation, Plaintiff-Appellee, v. GEORGE REID, Defendant-Appellant.	) APPEAL FROM THE MUNICIPAL) COURT OF CHICAGO, FIRST) MUNICIPAL DISTRICT OF THE) CIRCUIT COURT OF COOK) COUNTY, ILLINOIS.)) Frank B. Mahala, J.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment finding the defendant guilty of the violation of a Municipal ordinance and imposing a fine of $200.00 and costs of $10.00.

On June 8, 1965, the City of Chicago filed a statement of claim which alleged that on March 12, 1965, the defendant, Reid, owned, maintained, operated, collected rents for or controlled a building located at 3142 S. Calumet Avenue, Chicago, Illinois. The statement of claim contained five counts, all of which related to building code violations. A summons was issued against the defendant and the return of the Deputy Bailiff showed that the defendant was served with summons.

On September 22, 1965, the attorney for the defendant filed a special and limited appearance and on October 28, 1965, the defendant filed a pleading entitled "Petition of George Reid (defendant) To Vacate Judgment, Quash Execution or Warrant of Arrest and Commitment, and Quash Return of Bailiff." Also on October 28, 1965, the defendant filed "Interrogatories To Be Answered Under Oath by City of Chicago, Plaintiff." On December 21, 1965, the plaintiff filed a motion to strike the interrogatories. Thereafter,

on January 27, 1966, the attorney for the defendant filed a general appearance on behalf of the defendant. On February 18, 1966, the defendant filed a pleading entitled "Motion Pursuant to Article 114, Chapter 38, Illinois Revised Statutes, as Alternative Motion Under Rule 19." This motion contained the same interrogatories as were set forth in the document filed on October 28, 1965.

On April 6, 1966, the trial court entered an order sustaining the plaintiff's motion to strike the interrogatories.

It appears that the original statement of claim was not verified and the City was granted leave to amend the complaint by verifying it. This amendment was allowed without objection of the defendant.

After the entry of judgment against the defendant, the defendant filed a notice of appeal to the Supreme Court of Illinois. The Supreme Court thereafter, on May 4, 1967, transferred the cause to this court on motion of the plaintiff, City of Chicago, and stated that the Supreme Court had no jurisdiction on direct appeal in this case.

The complaint alleged the violation of the following sections of the Municipal Code of Chicago:

"Count	Code Section	Failed to
1.	43-1; 78-8.2; 78-10.1; 78-10.2	Deconvert building to its original plan or construction, or comply with the code provisions, and requirements for converted or altered structures.
2.	67-4; 78-15.1; 78-15.4	Provide additional means of egress for the following location -- 3rd floor
3.	62-3.2	Enclose all interior stairways with walls and partitions providing a fire resistance rating of not less than one (1) hour. -- 1st, 2nd, and 3rd floor

Count	Code Section	Failed to
4.	62-3.6	Provide self closing properly framed class "B" doors for openings to stairwell. 1st, 2nd and 3rd floor
5.	67-10.4b	Provide protection of underside of stairways with material having a fire resistive rating of not less than one (1) hour. -- Soffits."

The trial court found the defendant guilty of a violation only under Count 2, and returned a finding on motion of the defendant in favor of the defendant on Counts 1, 3, 4 and 5.

The defendant raises the following points:

1. "Plaintiff City of Chicago prosecuted defendant George Reid for $1,000 fine alleging violation of penal ordinances known as The Chicago Building Code, and violated defendant's rights guaranteed by amendments V, VI, XIV, Sec. 1, U. S. Constitution and Article II, Sections 2, 9 and 10, Illinois Constitution."

Defendant sets forth in his brief sub-headings under point 1, which will be discussed in the course of the opinion.

2. "The Municipal Code of 1961 repealed plaintiff City's authority to prosecute defendant for any fine under criminal action, by express provisions of Division 31, that the classification of 'Unsafe Buildings' have the remedy provided of chancery action, and plaintiff was therefore without authority to prosecute defendant."

The defendant has argued under point 1 that this suit, which was commenced by the filing of a statement of claim by the City of Chicago, to recover a fine for the violation of a Municipal ordinance is a criminal case, and cites in support thereof the case of City of Gibson City v. McClellan, 61 Ill. App. 2d 218. In that case a prosecution for the violation of a penal ordinance was dismissed on motion of the defendant based upon the proposition that the

defendant was not tried within 120 days after demand for trial, as required by the Fourth Term Act (Ill. Rev. Stat. 1965, chap. 38, sec. 103-5(b)). The City appealed. The court there held that the City had no right to appeal as the action of the trial court was in effect a discharge of the defendant rather than a dismissal of the indictment, and that, under the provisions of Supreme Court rule 27(4), the Appellate Court was without jurisdiction to consider the merits of the appeal, thereby holding implicitly that the ordinance violation prosecution was a criminal case. However, in that case the parties entered into a stipulation as to a point of law, and that stipulation was apparently accepted by the Appellate Court. The stipulation provided that the Fourth Term Act, which is contained within the Code of Criminal Procedure, applied to the violation of a penal ordinance of a city. This case was commented on in the later case of Village of Park Forest v. Bragg, 74 Ill. App. 2d 87, (reversed and remanded on other grounds, 38 Ill. 2d 225), wherein the court distinguished that case from other cases merely because of the stipulation that was entered into between the parties. The court in the Bragg case on page 92 said the following:

> "We fall back, then, upon the rule that ordinance violation prosecutions are quasi-criminal in character, but are subject to the rules of civil procedure."

In the case of City of Decatur v. Chasteen, 19 Ill. 2d 204, 216, the court said:

> "An action to recover a penalty for the violation of a municipal ordinance, though quasi-criminal in character, is civil in form and is ordinarily termed a civil action and not a criminal prosecution."

In City of Chicago v. Lewis, 28 Ill. App. 2d 189, the court held on page 191:

> "Under the law of Illinois, a suit to recover a penalty for violation of a city ordinance is governed by the rules of pleading and the law relating to civil practice, and not by the rules and laws applicable to criminal proceedings."

Other cases to the same effect are City of Chicago v. Joyce, 38 Ill. 2d 368; City of Highland Park v. Curtis, 83 Ill. App. 2d 218; City of Chicago v. Summit Fidelity and Surety Company, 46 Ill. App. 2d 460; City of Chicago v. Williams, 45 Ill. App. 2d 327; City of Chicago v. Campbell, 27 Ill. App. 2d 456.

The defendant has raised the point that at the trial he was not identified as the owner, or the one who maintained, operated, collected rents for or controlled the building or premises located at 3142 S. Calumet, Chicago, Cook County, Illinois. The evidence did not show that he either owned, maintained, operated, collected rents for or controlled the premises, as would have been required in a criminal case. The Civil Practice Act, which applies to proceedings such as the present one, sets forth in section 40 (Ill. Rev. Stat. 1965, chap. 110, sec. 40) the following:

> "(1) General issues shall not be employed. Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.
>
> (2) Every allegation, except allegations of damages, not explicitly denied is admitted, . . . unless the party has had no opportunity to deny."

The record in this case discloses that the defendant elected to waive the filing of an answer thereby admitting the allegations of the statement of claim as to ownership, maintenance, operation, collection of rents for or control of the building or premises. It was unnecessary for the plaintiff in this case, in the absence of an answer denying those allegations, to offer proof in support of them. By defendant's failure to deny ownership, management, control, etc., the fact was by him admitted.

The defendant argues that the court erred in sustaining plaintiff's objections to interrogatories filed by the defendant. The answers to the interrogatories would have been immaterial to the violation charged in count 2, the only count of which defendant was found guilty. While the answers may have been of help to defendant in his defense to the other counts the court found in his favor on those other counts. For that reason the court's ruling on the objections to the interrogatories is immaterial to a disposition of this appeal.

Defendant raises and argues that his rights under many sections of the Constitution of the United States and the Constitution of the State of Illinois have been violated. However, the defendant did not in the trial court, either by motion, answer or post-trial motion, raise any of the constitutional points he now seeks to raise on appeal. Actually, the defendant did not file an answer, nor did he file a written post-trial motion, or even make an oral post-trial motion.

Although we will not discuss the constitutional questions raised for the first time in this court, we have examined the points and believe they have no substance, which might well have prompted the Supreme Court to transfer the case to this court.

The Supreme Court of Illinois in Jenisek v. Riggs, 381 Ill. 290, on page 293, said the following:

> "Instead of presenting and preserving the question of the validity of the statute at the earliest opportunity, defendant did not attempt to attack its constitutionality until after an adverse verdict had been rendered against him and a ruling on his motion for a new trial was imminent. The first time, and apparently as an afterthought, in an effort to prosecute an appeal directly to this court, defendant sought to amend his motion for a new trial by adding a nineteenth reason, attacking the constitutionality of the statute. From the record it affirmatively appears that the constitutional validity of the statute involved in this cause was not presented for decision and was not passed upon by the trial court, and, further, was waived by defendant."

The court also held in that case that it would not assume jurisdiction of an appeal on the ground that a constitutional question was involved unless it appeared from the record that a fairly debatable constitutional question was urged in the trial court, the ruling preserved in the record for review and error assigned upon it in the reviewing court.

The defendant under point 2 contends that the City's authority to prosecute the defendant for any fine under criminal action was repealed by implication in the Municipal Code of 1961. Section 1-9-1 of that Code provides:

> "The provisions of this Code shall be cumulative in effect and if any provision is inconsistent with another provision of this Code or with any other Act not expressly repealed by Section 1-9-8, it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities."
>
> (Ill. Rev. Stat. 1965, chap. 24, par. 1-9-1)

Clearly then the Code was not intended to repeal, by implication, the City's authority granted by the State to prosecute for a fine due under its ordinances. Furthermore, defendant raises this point for the first time in this court and did not properly preserve the issue for appeal.

It also appears that the defendant objected to the refusal of the trial court to explain or give its reasons for rulings made during the course of the trial. While the giving of reasons for the rulings by the court during the course of the trial might be desirable, it is not essential and no pertinent authority is cited in support of defendant's contention on this point. The reasons for the trial court's rulings are immaterial when the decision is correct. Abrams v. Schlar, 27 Ill. App. 2d 237. If the decision is incorrect and it relates to a material matter, it can be raised on appeal where the point is properly preserved.

The defendant in this case was found to have violated Count 2 of the complaint, namely, that he failed to "provide additional means of egress for the following location -- 3rd floor." The failure to provide additional means of egress perpetuated a dangerous condition and exposed the occupants of the premises to the danger of being unable to escape in the event a fire occurred.

Under his second point the defendant seems to suggest that it is unreasonable and unlawful to enforce corrections of unsafe conditions in a building which was erected prior to the effective date of the ordinance. In City of Chicago v. Miller, 27 Ill. 2d 211, 214, the court said:

> "The mere fact that the building was originally constructed under the authority of a permit issued by the city in no way estops the city from bringing an action to compel compliance with the existing code."

The court further stated on page 219:

> ". . . we held that municipal corporations in the exercise of their police power may constitutionally require changes in existing structures for the protection of health and safety, ... We hold that the city in the exercise of its police powers as conferred by the legislature had the authority to enact the provisions involved here and also had the authority to make such provisions applicable to existing buildings."

See also Kaukas v. City of Chicago, 27 Ill. 2d 197.

We conclude that the court properly found the defendant guilty of a violation of Count 2 of the statement of claim and the judgment is therefore affirmed.

AFFIRMED

DEMPSEY, P. J. and SCHWARTZ, J. concur.

51852

95 I.A. 3 314

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JACOB H. EGNER, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION. Honorable John C. Fitzgerald, Judge Presiding

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a bench trial, the defendant, Jacob H. Egner, was found guilty of attempt murder and judgment was entered. His sentence is 2 to 7 years in the Illinois State Penitentiary. He appeals.

The instant case involves disputed facts concerning circumstances preceding and precipitating the alleged attempted murder. Henry Cap, the party stabbed, testified for the State that on January 29, 1966, at about 3:00 P.M., he was in the basement of an apartment building at 7014-22 North Sheridan Road in Chicago, attempting to fix a pump, pursuant to his duties as a maintenance man, managing agent and trustee for this building. One of the tenants, the defendant, approached him to make a complaint. Cap, seeing that the defendant was somewhat agitated, said that he and the defendant would talk about this tomorrow. The defendant left but returned later with his wife and in response to the defendant's command to "tell him," Mrs. Egner informed Cap that her husband was not drunk, in fact he did not drink. She then pointed her finger at Cap and said to him, "You are dead." Seeing that the defendant was getting more excited, Cap left the basement and went to the building office, where he met his friend, Alex Filton.

Both men, Cap testified, went to the Egner basement apartment where Mrs. Egner first appeared, but the defendant joined her shortly at the door of their apartment. Cap informed the

defendant that he and his family would have to move because the defendant was disturbing the peace. The defendant became very excited, pointed his finger at Cap's face, and looking at Filton, said: "He will be dead soon." This conversation and threat at the Egner basement apartment was corroborated by Filton, another witness for the State.

The defendant and his wife both testified for the defense. The defendant stated that he did not confront Cap in the afternoon of January 29, 1966, to make any complaints, and he never returned with his wife to the basement. The defendant's wife corroborated the latter statement. Furthermore, the defendant testified, when Cap came to the Egner apartment later in the afternoon, the defendant never went to the door and threatened Cap, but rather he remained watching television and only overheard parts of the conversation between Cap and Mrs. Egner. The defendant went on to testify that he met Cap in the basement of the Sheridan Road apartment building only once on January 29, 1966, and that was at approximately 6:00 P.M. Mrs. Egner testified that her husband remained in their apartment throughout the day until he left at approximately 6:00 P.M. She did not know where he went.

We now come to the events of January 29, 1966, at approximately 6:00 P.M. Cap testified that he was in the basement, trying to fix the defective pump, when the defendant appeared again. The defendant was quiet and both parties had an amiable conversation. Another tenant, Mario Reator, was in the basement at this time and he watched Cap attempting to repair the pump. Cap went on to testify that he turned his back on Reator and the defendant so as to resume his repair work, when he felt "like a hammer in my back and then a sharp pain in my neck." Reator fled and Cap sought to get to his feet and in so doing, he was cut again on his hand and on his arm. Cap then was able to turn

around and saw that the defendant had a knife in his hand. Both parties grappled for possession of the knife, and Cap was cut again in the chest, as the defendant kept saying, "You are dead, you are dead."

Cap, a much larger and heavier man than the defendant, though older, was able to take the knife away from the defendant, who then walked out of the basement. Cap crawled into the street where he was found by police and was rushed to the hospital. Near the end of Cap's testimony, the State introduced into evidence a hunting knife owned by the defendant and voluntarily surrendered by his wife. Cap identified this knife as being very similar to the knife that was in the defendant's hand during the stabbings. On cross-examination, Cap testified that he did not hit the defendant.

Mario Reator testified for the State that he was in the basement at approximately 6:00 P.M. talking with Cap when the defendant came in. He and Cap knelt down to look and work on the pump. At that time Cap was between this witness and the defendant. Cap was not facing the defendant. Suddenly, Cap "came over on top" of Reator who was kneeling beside him. Reator then left the premises. He did not see Cap strike the defendant.

The defendant testified that at 6:00 P.M. he met Cap in the basement and asked for an extension of time in which to move. Both parties became abusive, verbally and physically, according to the defendant's testimony, and he remembered getting hit with something. The defendant testified that he did not strike Cap prior to being struck by a flashlight, wielded by Cap, which caused the defendant to fall. Cap was then over him and the defendant felt Cap's weight on him. The defendant felt more blows and then, being scared, he slashed at Cap with the knife he had in his belt. He stabbed Cap two or three times, whereupon Cap got up and ran out the back entrance of the building. On

cross-examination, the defendant admitted that the knife introduced into evidence by the State was the one he used in the basement.

On appeal, the defendant contends: (1) he was not proved guilty beyond a reasonable doubt; (2) his sentence was excessive and should be reduced. In response, the State denies these contentions.

In support of his contention that he was not proved guilty beyond a reasonable doubt, the defendant raises the affirmative defense of voluntary intoxication to the specific intent offense charged in the instant indictment, i.e., attempt murder. The record indicates that the defendant's sole defense in the trial court proceedings was self-defense. This fact is made most evident from the conversation had in open court between defendant's trial counsel and the trial court judge after a finding of guilty had been returned. At that time, defendant's counsel specifically stated that the defendant's defense was self-defense. No specific mention was made of voluntary intoxication as an affirmative defense.

On appeal, the defendant asserts that his failure to raise the affirmative defense of voluntary intoxication in the trial court proceedings should not result in a waiver of this defense on appeal. He claims such failure to be a plain error in the record affecting substantial rights which may be noticed by a reviewing court although not brought to the attention of the trial court. See Ill.Rev.Stat.(1965) ch.38, §121-9(a); repealed by Act approved September 5, 1967, and reenacted without change in Ill.Rev.Stat.(1967) ch.110A, para.615(a).

Even if this court should allow the defendant to raise this defense for the first time on appeal, it would not aid the defendant. In People v. Winters, 29 Ill.2d 74, 193 N.E.2d 809 (1963) and in People v. Lion, 10 Ill.2d 208, 139 N.E.2d 757 (1957), it was held that voluntary intoxication is a proper defense to a specific intent offense only when the intoxication is so

extreme as to suspend entirely the power of reason and render the accused incapable of any mental action. In the instant case there is conflicting testimony regarding the defendant's voluntary intoxication at the time of the offense, but there is no evidence in the record supporting the proposition that the defendant's intoxication was so extreme as to entirely suspend his power of reason. In fact, just the opposite is true. The defendant took the stand in this case and was able to testify in great detail as to what occurred prior to, during and immediately after his scuffle with Cap. His power of reasoning was not entirely suspended on the day in question as is demonstrated by his own testimony. Hence, the defendant's voluntary intoxication defense, even if allowed to be raised for the first time on appeal, will not reverse his conviction.

The record indicates that the defendant was proven guilty beyond a reasonable doubt. The evidence is conflicting, but the trial court entered its finding of guilty to attempt murder after evaluating the credibility of the individual witnesses and weighing the testimony of both sides. Filton corroborated the testimony of Cap that the defendant said Cap would be dead soon. This threat occurred when Filton and Cap conversed with the defendant in his basement apartment before the later affray. The conversation was denied by the defendant. Reator corroborated Cap's testimony that Cap had his back turned to the defendant immediately before the stabbing in question. He also testified that Cap suddenly fell on him. Furthermore, Reator testified that he did not see Cap strike the defendant. Although cross-examined, both witnesses did not change their testimony. Hence, there is sufficient competent, credible evidence in the record to support the trial court's finding that the defendant was the aggressor in this affray and was guilty of attempt murder.

Secondly, the defendant urges this court to reduce the

sentence imposed by the trial court. The hearing in aggravation and mitigation of the offense is included in the record. At that hearing the defendant requested probation whereas the State asked for a sentence of 7 to 15 years. After hearing evidence in aggravation and mitigation, the trial court denied probation because of the violence involved and sentenced the defendant to 2 to 7 years.

On appeal, the defendant is requesting a period of probation with time considered served or a minimum of a year with a proper maximum in the Illinois State Penitentiary. We note from the record that the defendant is a married man with five small children and is frequently unemployed due to hypertension, arthritis and emotional trouble. At the time of the affray, defendant, his wife and his children were living in a basement apartment and were discomforted by the lack of heat on a day when the temperature was twenty degrees below zero. This lack of heat was apparently due to the defective pump which Cap was attempting to repair.

However, the record also indicates that the defendant threatened to kill Cap, later did stab him five times with a hunting knife without any provocation and was guilty beyond a reasonable doubt of attempt murder. The maximum sentence for attempt murder is 20 years. See Ill.Rev.Stat.(1965) ch.38, §8-4(c)(1). In light of all the circumstances in this case, we cannot hold the sentence to be excessive.

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,	)
	)
Plaintiff-Appellee	)APPEAL FROM THE
	)CIRCUIT COURT OF
vs.	)COOK COUNTY
	)MUNICIPAL DEPARTMENT
FELTON BRIDGEWATER,	)CRIMINAL DIVISION
	)
Defendant-Appellant.	)
	)HON. MAURICE D. POMPEY
	MAGISTRATE

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

On August 24, 1966, the defendant, Felton Bridgewater, was tried by a Magistrate sitting without a jury and found guilty of the crime of battery. He was sentenced to ninety days in the County Jail.

On June 17, 1966, the defendant appeared before Magistrate Maurice D. Pompey in response to a complaint sworn out by his wife, Ann Bridgewater. The Magistrate granted leave for the complaint to be filed instanter. On motion of the defendant, the cause was postponed and set for trial on July 1, 1966. On July 1st the defendant was arraigned before Magistrate Pompey. He entered a plea of not guilty and waived his right to a jury. Also, the defendant's motion for a continuance was granted by the court and the trial date was extended to July 8th. On the latter date the State was granted a continuance until August 15th. On that date the defendant, appearing before Magistrate Pompey, moved for a change of venue and filed a written petition in support thereof. The motion was continued on the defendant's request until August 24th. On that date Magistrate Pompey denied the motion for a change of venue. He also denied defendant's motion that he be allowed to withdraw his jury waiver. The cause then proceeded immediately to trial at the conclusion of which the Magistrate

found the defendant guilty of battery. At a later date, the defendant was sentenced by the Magistrate to a term of ninety days in the County Jail. The defendant has appealed from the finding of guilty by the trial court and the judgment entered thereon.

The defendant contends, on appeal, that the court erred in denying his motions for change of venue and withdrawal of jury waiver, and therefore, that the bench trial which followed was null and void.

The defendant, in his petition for change of venue which is supported by affidavit, alleges that he is afraid he will be unable to receive a fair trial before Magistrate Pompey because he believes said Magistrate is prejudiced against him. The petitioner further alleges that he first came to knowledge of the Magistrate's prejudice against him at 9:40 A. M. on August 15, 1966, the day on which the petition was filed. Prior to denying the defendant's motion, on August 24th, Magistrate Pompey asked defendant's counsel why he was asking for the change of venue and also inquired as to the time when the alleged prejudice was first called to defendant's attention. Having received answers to these questions, the Magistrate then called on the State to answer defendant's motion. At the conclusion of the State's Attorney's oral argument, the Magistrate summarily denied defendant's motion.

The procedure, with regard to defendant's petition for a change of venue is governed by Section 114-5(c), and not by Section 114-5(a) of chapter 38 of the Illinois Revised Statutes which provides in relevant part: "...any defendant may move at any time for substitution of judge for cause,

supported by affidavit. Upon the filing of such motion the court shall conduct a hearing and determine the merits of the motion." According to the Committee Comments following these provisions (and under the authority of People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297) Section 114-5(c) is to be read and construed in pari materia with the venue provisions announced in Sections 18-35 of Chapter 146 of the Illinois Revised Statutes. Section 18 of Chapter 146 provides that it is "cause" for a change of venue when a defendant fears that he will be unable to receive a fair and impartial trial because the judge assigned to try his case is prejudiced against him. It is perfectly proper for a petition to be presented on the day of trial in a criminal case when prejudice is alleged so long as the trial judge has heard no matters pertaining to the merits of the cause and has not expressed his views thereon. People v. Gregory, 16 Ill. App. 2d 576, 149 N. E.2d 198.

We have concluded that defendant's petition for a change of venue was drawn and presented in compliance with Section 114-5(c). The defendant, in his petition, alleged that he believed Magistrate Pompey was prejudiced against him; this allegation demonstrated the "cause" called for by the Statute. The Magistrate in the instant case had neither heard nor expressed an opinion concerning the merits of the cause. Therefore, the petition was filed in apt time.

On August 15th, the date of the defendant's application for a change of venue, the Magistrate did not proceed with the trial, but instead granted another continuance prior to ruling on the motion. The Magistrate should either have held a hearing to determine the truth and substance of defendant's allegations or have granted defendant's request

outright on August 15th. If the evidence adduced at the hearing revealed that the petition represented a delaying tactic which placed an undue burden upon the court's time, the Magistrate could then have properly denied the petition. However, the court failed to proceed in timely fashion to determine the merits of petitioner's request. On August 24th, the Magistrate heard only arguments of counsel before denying defendant's motion. This procedure did not comply with the statutory mandate for a hearing. People v. Ethridge, 78 Ill. App. 2d 45, 223 N.E. 2d 437. Under the circumstances presented in the case at bar the Magistrate's denial of defendant's petition represented an abuse of discretion. Defendant's uncontradicted petition must be taken as true and his request for a change of venue granted. People v. Arnold, 76 Ill. App. 2d 269, 222 N.E.2d 160.

In view of the conclusion we have reached and in the interest of justice and fairness, the court should again determine whether or not the defendant wishes to be tried by a jury.

The judgment of Municipal Department of the Criminal Division of the Circuit Court is reversed and remanded for a new trial with directions to grant defendant's petition for a change of venue and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ADESKO AND MURPHY, JJ., CONCUR.

(Abstract only)

No. 51697

95 I.A. 3 4469

CITY OF CHICAGO, a Municipal Corporation, Plaintiff-Appellee, v. RICHARD CHIAGOURIS, d/b/a Frontier Management Company, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Louis A. Wexler, J.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, Richard Chiagouris, appeals from a judgment of guilty fining him $1,000 for certain violations of the Building Code of the City of Chicago and from an order denying his petition to vacate that judgment. Judgment was entered after a trial by court without a jury.

On April 4, 1966, the City of Chicago filed a complaint charging defendant with seventeen violations of twenty-three provisions of the Municipal Code in his operation of the premises located at 311 West Root Street, Chicago. On May 11, 1966, the court entered an order, reciting that it had examined John Dau, a building inspector for the City, under oath, that there was probable cause for filing the complaint, and that leave was given to said John Dau to file "the complaint herein under oath". On the same day, defendant filed his pro se appearance, and asked that the cause be continued. It was then set for trial on May 25, 1966. On that date, the court entered an order which recited that a trial was had without a jury, "it appearing to the court that said defendant had duly and regularly waived a jury trial in this cause", and that after hearing evidence and arguments, defendant was found guilty of violation of the ordinance described and fined $2,000. On June 15, 1966, the

court vacated that judgment, and another trial was had without a jury, it again appearing that defendant had "duly and regularly waived a jury trial" in the cause. Before proceeding to trial, defendant answered in the negative when asked by the court if he wished time to get an attorney. The attorney representing the City then made a preliminary statement before trial that the defendant had been requested to deconvert the extra apartments in his building which were in excess of the ordinance limit in order to return the building to its original construction. At this trial, John Dau testified that he found that the exterior walls on all sides needed to be repaired, that there was a defective stoop on the first floor west side, that the roof, gutter and downspout on two sides needed to be repaired or replaced, that throughout the building interior walls and ceilings, loose surface material on the walls and ceilings, defective floors, window panes and sashes, needed repair, removal or replacement. Dau reinspected the building on May 23, 1966, at which time he found that repair work had been commenced only on the porches. He also testified that the building had been constructed as a two-story frame building, but that at the time of his original inspection there were five dwelling units, and at the time of his reinspection there were still four units. He further testified that defendant had been given notice on December 3, 1965 to correct the violations and to restore the building to its original construction of two units. Defendant testified that he never converted the building, that it had five units when he bought it. He also testified that he believed that the City was going to purchase and demolish the building, and that he had served notice on his tenants to vacate and that he would board up the building if the court wished. The judge then

stated that defendant had been given over six months to correct the conditions or close the building, but had not done so. He again found defendant guilty and imposed a fine of $1,000. At defendant's request, he was given until July 15, 1966 to pay the fine. On July 12, 1966, defendant filed a petition to vacate the judgment reiterating his trial testimony and stating that he had not realized that he needed counsel at the time of trial. This petition was denied.

Defendant appeals, contending that the action was instituted on an improper complaint, that he was denied the right to a trial by jury, that the judgment was not supported by the evidence, and that the City was improperly represented by a person not authorized to practice law.

A prosecution for the violation of a municipal ordinance to recover a fine or penalty, while quasi-criminal in nature, is civil in form and is tried and reviewed as a civil proceeding, and not as a criminal prosecution. City of Highland Park v. Curtis, 83 Ill. App.2d 218, 226 N.E.2d 870 (1967). Such a suit is governed by the rules of pleading and the laws relating to civil practice, and not by the rules and laws applicable to criminal proceedings. A proceeding to recover penalties for violations of the Building Code of a municipality, while resembling a criminal prosecution in some respects, follows civil rules of procedure. City of Chicago v. Lewis, 28 Ill. App.2d 189, 171 N.E.2d 70 (1960); City of Chicago v. Campbell, 27 Ill. App.2d 456, 170 N.E.2d 19 (1960).

Defendant first contends that the action was improperly instituted because the complaint was not sworn. No objection to the complaint as not being verified was raised in the trial court. Section 42 (3) of the Civil Practice Act provides:

"All defects in pleadings either in form or in substance, not objected to in the trial court, shall be deemed to be waived."

Not having been asserted in the trial court, it has been waived. Further, the record in the instant case shows that the order of court entered on May 11, 1966 recited that the complaint was "herein under oath", and that the court examined John Dau under oath. A properly authenticated record imports verity and the Appellate Court is bound by it. City of Chicago v. 3 Oaks Wrecking and Lumber Co., 65 Ill. App.2d 328, 213 N.E.2d 48 (1965). Defendant's allegation that the copy of the complaint presented to this court does not contain a signature and is therefore unsworn, is insufficient to contradict the record.

Defendant next contends that he was improperly denied his right to trial by jury. Defendant filed a pro se appearance, was present and stated that he was ready for trial. Under the rules of civil procedure, Ill. Rev. Stat. 1965, Ch. 110 §64(1), a defendant must file a demand for jury no later than the filing of his answer. His failure to make such a demand at that time constituted a jury waiver. In addition, the court orders of May 25, 1966 and June 15, 1966 recite that trial was had without jury, it appearing that defendant had "duly and regularly waived a jury trial". As stated above in City of Chicago v. 3 Oaks Wrecking and Lumber Co., supra, the record imports verity and binds us to the declaration that defendant waived a jury.

Defendant also urges that the evidence presented did not support the judgment, first contending that the City had to prove him guilty by evidence beyond a reasonable doubt. The law is settled that the burden of proof on the municipality in these cases is to establish violation of the ordinance by a clear preponderance of the evidence. City of Chicago v. Carney,

34 Ill. App.2d 303, 180 N.E.2d 729 (1962); City of Highland Park v. Curtis, 83 Ill. App.2d 218, 226 N.E.2d 870 (1967). Defendant also maintains that the judgment of guilty cannot stand because no evidence was presented at trial as to an illegal conversion or deconversion. He argues that the City was restricted to offering proof of illegal conversion at trial because that was the only violation mentioned by the attorney for the City in his opening statement. However, a party is not confined in the introduction of evidence by the opening statement. Petersen v. General Rug and Carpet Cleaners, Inc., 333 Ill. App. 47, 77 N.E.2d 58 (1948). The City inspector testified in detail that upon inspection he found floors, gutters, exterior walls, ceilings, windows, interior wall surfaces and window sashes all in need of repair or replacement. He also testified that defendant had been notified of these violations six months prior to trial. These constituted serious and uncorrected violations. Defendant's only rebuttal was that the building was in the same condition as when he purchased it. The court replied that he had over six months to have done this, and then imposed the fine. There was ample evidence presented to support the judgment of the court.

Defendant's last contention that counsel for the City was not licensed to practice law in the State of Illinois is not supported by the record.

Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and LYONS, J. concur.

51791

95 I.A. 2447

JOHN HANN, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
v.	)	COURT OF COOK COUNTY.
EDNA MILLA, Defendant-Appellee.	)	Charles P. Horan, J.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Plaintiff, John Hann, brought suit against defendant, Edna Milla, for injuries arising out of an automobile collision between the parties. This suit was consolidated with an action in which Bernard Milla sued John Hann for property damages to his automobile arising out of the same collision. After trial, the jury found for neither plaintiff John Hann, nor for plaintiff, Bernard Milla, and so found both defendants not guilty in the above cases. John Hann appeals from the adverse jury verdict, the trial court's judgment on the verdict, and the court's denial of plaintiff's motion for a new trial, contending that reversible error was committed by virtue of the trial judge's reprehensible conduct towards counsel for plaintiff, and because of improper remarks and conduct by counsel for defendant during closing argument. No questions are raised as to the pleadings, jury instructions, sufficiency of evidence and weight of evidence supporting the verdict.

On September 21, 1959, plaintiff was driving north on Eggleston Avenue in Chicago. He stopped at a stop sign at 76th street, a four lane through street. Repair work on 76th street had caused a large back up of traffic. After waiting 8 to 10 minutes, he proceeded across 76th street. He testified that he looked left and right, but did not see another car until he was past the middle of the street at which time he saw defendant's car coming from

the east. He also testified that at that moment defendant's car was about 3 car lengths away and traveling about 25 to 30 miles per hour. Plaintiff testified that he was traveling about 10 to 15 miles per hour at the instant of impact, and that the right front side of defendant's car hit the right rear side of plaintiff's car. Defendant testified that she was driving west on 76th street at about 15 miles per hour. When she saw plaintiff start across 76th street, she applied her brakes, thus reducing her speed to 5 miles per hour and almost stopping the car at the moment of impact. She testified that she was about 30 feet from the intersection when plaintiff's car started across the street, and she estimated plaintiff's speed at about 25 miles per hour. Plaintiff sustained injuries to his left shoulder, arm and neck.

Plaintiff first contends that the trial judge showed anger, bias, hostility and impatience towards his attorney so as to constitute reversible error.

"Errors relied upon for a new trial must be included in the post-trial motion and must be set forth therein with particularity. If they are not, they are waived." Ill. Rev. Stats., 1955, ch. 110, §68,1(2), Handler v. Eckhouse, 45 Ill. App.2d 382, 195 N.E.2d 838 (1964). Plaintiff cites a number of rulings made by the judge to indicate his bias and hostility. Most of the rulings complained of are not preserved for review by specification in the post-trial motion. In this opinion, we will consider only those rulings which were preserved in the motion for a new trial. This is particularly pertinent in the instant case because, at the time of hearing on the post-trial motion, the judge requested that counsel for plaintiff stop

arguing generalities and get down to specifics. He then offered to continue the motion so that he and the attorneys together could examine the transcript of proceedings line by line to discover whether error was committed. This was not done.

While we will consider only those rulings which have been preserved, since the conduct of the trial judge is at issue, we have examined every ruling which has been cited as displaying the hostility of the court. We find that these rulings were not prejudicial, and that to most of them, no objections were made. Some of these rulings complained of should be noted. Plaintiff contends that the court displayed its hostility in allowing counsel for defendant to ask the plaintiff how wide the street was on which plaintiff was driving, whether there was a man in uniform at the scene of the accident, the length of plaintiff's car, the positioning of the cars before and after impact, and in asking both attorneys out of the presence of the jury if they would stipulate as to certain questions and answers having been given at a deposition because the court reporter had lost his notes. Clearly, this request and these rulings were proper.

As to those rulings which were preserved for review, plaintiff contends that the judge restricted and hurried his cross-examination of defendant and her passenger so as to make the examination meaningless. He maintains that the judge restricted his attempts to show that defendant was anxious to get home because of her son, that defendant was talking to her passenger, and that defendant's alertness was affected because she was traveling on a through street. A review of the record

indicates that the question concerning defendant's anxiety to get home was asked at least 4 times; the question concerning defendant having a conversation with her passenger was asked at least 6 times; and the question concerning defendant's awareness of the fact that she had the right of way was asked at least 5 times. While all parties have the right to a complete cross-examination, the amount of repetition allowed to counsel in the examination of a witness is within the sound discretion of the court. Barrett v. Wallenberg, 62 Ill. App. 2d 478, 210 N.E.2d 782 (1965). Where facts have already been stated by a witness, questions which have for their object the repetition by a witness of what he has already said may be disallowed by the court. County of Cook v. Colonial Oil Corp., 15 Ill.2d 67, 153 N.E.2d 844 (1958). It is evident that counsel for plaintiff was given ample opportunity to cross-examine the witnesses. The trial judge did not abuse his discretion by limiting repetitious questions. The plaintiff also states that, in sustaining objections to these questions, the court made remarks that the questions were repetitious, or such remarks as: "Let's get on with the trial." These admonitions also were well within the sound discretion of the court.

Plaintiff also urges that the court showed prejudice by limiting his questions prior to a recess and before another recess taken by the court to attend a meeting of judges. However, the record reveals that the judge was willing to let counsel continue before the first recess, but that after consideration, counsel for plaintiff stated that they better have

the recess. The record also indicates that the judge merely placed all parties on notice that he would have to adjourn to attend a meeting of judges.

During the course of trial, when a group of students entered the courtroom, the court started to make a statement to them. Counsel for plaintiff interrupted the judge to ask that the statement be placed on the record. The judge then asked counsel whose record it was. Although the record is silent, plaintiff states that this reply was made angrily. Immediately after this colloquy, the judge declared a recess, and outside the presence of the jury told counsel for plaintiff that he would hold him in contempt if he showed further disrespect toward the court, and that counsel had been "prolonging the senseless cross-examination". The remarks made outside the presence of the jury were not prejudicial to the plaintiff. The inquiry by the court as to whose record it was, even if made angrily, was not such as would require reversal. Dickeson v. B. & O. C. T. R. R. Co., 73 Ill. App. 2d 5, 220 N.E.2d 43 (1963); Piechalak v. Liberty Trucking Company, 58 Ill. App.2d 289, 208 N.E.2d 379 (1965).

Plaintiff next urges that the court acted improperly in allowing defendant to question the plaintiff under Section 60 on matters which had already been given in plaintiff's prior testimony. Counsel for defendant examined plaintiff regarding certain exhibits which he then introduced into evidence. These exhibits were part of defendant's case in chief, and it would have been improper for defendant to introduce them into evidence on a cross-examination during plaintiff's case. Horner v. Bell, 336 Ill. App. 581, 84 N.E.2d 672 (1949).

The court acted in its sound discretion in allowing 45 minutes to plaintiff for closing argument, and in not allowing counsel for plaintiff an interval between the conclusion of the instructions conference and the closing argument. Limitation and placement of the final argument is within the sound discretion of the trial court. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N.E. 787 (1905). Allowance of 45 minutes for a 3 day trial was not an abuse of that discretion. Plaintiff also complains that the court reminded him during closing argument that he had 8 minutes remaining. We consider such a reminder by the court not an exhibition of hostility, but a courtesy.

In submitting the various possible verdicts to the jury, the court used the expression "washout" to describe the verdict in which the jury would find for neither plaintiff nor defendant. Such characterization was not prejudicial to plaintiff.

In his second general assignment of error, plaintiff urges that the judgment be reversed because of counsel for defendant's improper argument to the jury citing over twenty instances of alleged misconduct. None of the instances complained of was the subject of an objection during trial, and only one of the instances was specified in the post-trial motion. Where improper remarks of counsel in his closing argument are not objected to or specifically set out in the post-trial motion they are waived upon appeal. Kortlander v. Chicago Transit Authority, 56 Ill. App.2d 48, 205 N.E. 516 (1965). While in Ryan v. Monson, 33 Ill. App.2d 406, 179 N.E.2d 449 (1961), the court found that the closing argument was so prejudicial that it could be raised on review, even though there had been no objection made at trial,

the record in the instant case indicates that the remarks complained of were not of such a prejudicial nature. Considerable latitude is accorded to counsel in making closing arguments. Hopwood v. Thomas Hoist Co., 71 Ill. App.2d 434, 219 N.E.2d 76 (1966).

The one instance of improper conduct attributed to counsel for defendant which was set forth in the motion for new trial claims that counsel for defendant, the judge, and one juror were smiling and silently laughing during part of plaintiff's closing argument. Such conduct does not appear of record and is not available for consideration on review.

It is not contended that the verdict is not supported by the manifest weight of evidence or that there is no evidence to support the verdict. Under such circumstances the verdict will not be disturbed for contentions of a non-prejudicial nature. Patryn v. Zaccaria, 302 Ill. App. 84, 23 N.E.2d 378 (1939); Hedge v. Midwest Contractors, 53 Ill. App.2d 365, 202 N.E.2d 869 (1964).

We believe that the plaintiff received a fair and impartial trial, and that the court conducted itself with restraint.

Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and LYONS, J. concur.

51800

95 I.A. 2 447-2

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY,
vs.	)	CRIMINAL DIVISION.
	)	
EUGENE MINOR, (Impleaded),	)	Honorable James A. Geroulis,
	)	Judge Presiding.
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Defendant, Eugene Minor, was tried and convicted in a bench trial for the offense of burglary and sentenced by the court to serve a term of from not less than one (1) nor more than two (2) years in the State Penitentiary. Defendant by this appeal challenges the sufficiency of the evidence to establish his guilt beyond a reasonable doubt, limiting the theory of his case to an attack upon the credibility of the single identification of him by the complainant, Mrs. Catherine Lee, the only witness called to testify in behalf of the prosecution.

It would appear from Mrs. Lee's testimony that at approximately 6:30 A.M. on January 9, 1966, she was awakened from her sleep by her 12 year old son and told that two men were prowling in their home, a third floor apartment located at 3808 South Ellis Avenue in the City of Chicago. The complainant explained that she put on a garment and hurried downstairs to the front entrance of the building, from which vantage point she observed two men in the middle of the street carrying away her hi-fi set (a unit approximately 3' x 4' in dimension and apparently of a portable nature) and some phonograph records. She stated that upon shouting at the pair to put down her hi-fi, the two men turned about so that she could observe their faces and then took flight.

The witness stated that she then proceeded to chase the men for about a block, getting as close to them as six to seven feet and gaining momentary observations of their identities as

they occasionally glanced back at her. Mrs. Lee explained that she eventually abandoned her pursuit when the men dropped the hi-fi set and scaled a fence in the rear of a nearby building. The complainant related further that it had been bright daylight outside at this particular time to facilitate her observations, as well as cold and snowing. She, however, could not recall whether the two street lights in closest proximity to the occurrence were then illuminated.

Upon her recovery of the hi-fi set and return to her apartment, Mrs. Lee noticed that, in addition to the hi-fi, twenty-five records, two dresses, a ski jacket and clock radio were missing, none of which were ever recovered. She stated that she similarly observed that a bottom panel from her apartment's front door had been pried off to facilitate entrance into her home.

The complainant testified that 31 days after the burglary she first had occasion to identify defendant and his co-indictee, one James W. Robinson, as the same men she had seen fleeing from her apartment. This identification took place in a courtroom at the Criminal Court Building during certain preliminary hearings on February 9th, which would appear from the common law record to have been on the same date as the Grand Jury hearing in this matter. Mrs. Lee added that she was able to positively identify defendant and Robinson, whom the witness referred to by their alleged nicknames of "Dino" and "Twister" respectively, because they were recognizable to her on sight as two men with whom she shared a casual acquaintance in the past. Defendant was similarly identified by Mrs. Lee at the trial, the witness reassuring the trial judge upon inquiry from the bench, that she was positive in her identification of the accused. Nothing, however, was elicited from the witness relative to her use of this information to assist the police in the eventual arrest of defendant.

On cross-examination, the complainant denied having

stated in the original police report in the matter that the only person whom she observed or could identify was co-indictee, Robinson, conceding however that she had told the police that she first saw one or both men attempting to put the hi-fi set into an automobile. The witness excused, the State rested its case, whereupon defendant interposed a motion for a finding of not guilty, which motion was denied.

Testifying in his own behalf, defendant acknowledged his familiarity with the State's witness on an impersonal basis from "seeing her around," admitting in this respect that on the date in question he resided about 1-1/2 blocks away from the Lee apartment building. Defendant, however, denied being known by the nickname "Dino," alleging to have been alone at home in bed at this time suffering from an ulcerated and infected leg. He submitted in this regard to have had, on occasion, sought and obtained medical treatment for his leg at the Cook County Hospital clinic, as well as at the County Jail hospital, following his arrest and confinement. Defendant stated that because of the infectious condition of his leg, on the date of his alleged commission of the crime, he walked with a limp and often used a cane.

At this juncture in the trial court proceedings, the defense offered into evidence without objection by the State, Defendant's Exhibit No.1, the United States Weather Bureau Report taken at Midway Airport (by our computations approximately six miles to the southwest of the scene) on January 9, 1966. That official document reported the sun rose that day at 7:17 A.M., further describing the weather as cold and absent any precipitation.

On re-direct examination, defendant charged that co-indictee, Robinson, and the complaining witness, in fact, knew one another on other than an informal basis without elaborating on the subject in further detail. This was, in essence, the extent of the testimony and evidence adduced at the trial, and

upon which the court predicated its finding of guilt.

Defendant, on appeal, advances an argument which accents the recognized fallibility of the human senses of visual perception and memory and more specifically as those fragilities find application in the identification made by the complaining witness. Defendant, in so doing however, does not attempt to challenge the rule which holds that the positive testimony of one eyewitness, who had ample opportunity for observation, is sufficient alone to sustain a conviction for burglary even if such testimony is contradicted by that of the accused himself. People v. Waller, 85 Ill.App.2d 55, 229 N.E.2d 298 (1967); People v. Golson, 76 Ill.App.2d 1, 221 N.E.2d 1 (1966), aff., 37 Ill.2d 419 (1967); People v. Gooch, 70 Ill.App.2d 124, 217 N.E.2d 523 (1966). Rather, defendant submits, and we agree, that this accepted rule must be tempered by, and in a proper case yield to, the dictates of reasonable probability and common experience. People v. Ware, 23 Ill.2d 59, 177 N.E.2d 362 (1961); People v. Dawson, 22 Ill.2d 260, 174 N.E.2d 817 (1961).

The law entrusts to the findings of the trial judge, as the trier of fact, in view of his superior position to observe the witnesses, considerable latitude as to his determinations of credibility and weight to be accorded the respective testimony. Simply because the court below believed the identification testimony as against the alibi offered by the accused does not warrant nor empower a reviewing court to substitute its opinion as to matters effecting the credibility and weight to be given that same evidence, unless the proof of guilt is so unsatisfactory as to justify a reasonable doubt of guilt. People v. Crenshaw, 15 Ill. 2d 458, 155 N.E.2d 599 (1959). Where, as in the instant case, defendant's conviction is founded upon a single identification which was both doubtful and open to scrutiny as a consequence of the potentially pre-suggestive mode of identification employed,

and the accused has offered a plausible uncontradicted alibi, such an eyewitness account must be relegated to such an unconvincing level as to foreclose proof of the crime charged beyond a reasonable doubt. People v. Gardner, 35 Ill.2d 564, 221 N.E. 2d 232 (1966).

While there would appear to be no dispute that the Lee premises were burglarized on the morning in question, the narrative account of the eyewitness' identification of defendant was weak and open to error in several manifest respects. As to the witness' opportunity for observation, it was never established whether the adjacent street lights were on. Mrs. Lee remained adamant in her position that it had been bright daylight outside, notwithstanding the somewhat unreconciled fact that the sun did not rise officially over the city that morning until some 47 minutes subsequent to the events she related. Moreover, her account of the then prevailing snowing condition would strongly suggest a heavy cloud cover, the court being likewise mindful of the then existing abbreviated daylight hours of the winter season. Without doing violence to defendant's case, we would not think it fair, absent some evidentiary showing to the contrary, to conjecture as to the sufficiency of the lighting conditions prevailing early that morning.

The doubtfulness of Mrs. Lee's identification is further compounded by the momentary or fleeting glances she was able to secure. The witness first viewed defendant at a distance across a street and then at a closer interval as the chase proceeded through a gangway and behind a nearby building, which latter area we can safely presume did not benefit from the optimum lighting conditions which may or may not have been afforded by the street lamps. Defendant was not seen during the commission of the offense itself, nor did the single identification of him immediately follow. Under comparable circumstances such has been deemed cause

for reversal of a conviction. People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444 (1965); People v. Fiorita, 339 Ill. 78, 170 N.E. 690 (1930).

To the foregoing the State answers, and appropriately so, that such tenuous elements of their case are of insufficient moment to either overcome or even impugn the eyewitness' identification inasmuch as the accused in the instant case was known on sight by his accuser. From within a different factual setting we might be inclined to agree. Here, however, Mrs. Lee knew, or knew of, defendant apparently well enough to be aware of his nickname, "Dino," an identity which the accused denied and upon which question the State offered nothing in corroboration. A material inconsistency appears further by the State's failure to, at any juncture, demonstrate that the witness volunteered this peculiarly valuable information to the police in aid of their investigation into the matter, much on a parallel with the circumstances in the case of People v. Roe, 63 Ill.App.2d 452, 211 N.E. 2d 552 (1965) which prompted a reversal of a conviction from this court. This should be viewed from within the context of our observation that the witness' testimony in other respects was not beyond reproach. She was impeached on cross-examination relative to certain events she had originally told the police for purposes of their report, an important point upon which the witness remained silent at the trial. Moreover, her explanation of the uninterrupted sequence of events following their initial confrontation in the street curiously failed to account for the accused's disposition of the still unrecovered dresses, jacket and radio. The identification itself was made after a considerable lapse of time (31 days) following the burglary, unlike the case of People v. Napue, 83 Ill.App.2d 41, 227 N.E.2d 143 (1967). Mrs. Lee singled out two men, both of whom were familiar to her on sight, in custody in court, pending certain preliminary proceedings into

the very matter which was the subject of the witness being called to the courthouse in the first instance. Certainly under such circumstances the identification was not entitled to the same weight and credibility as where the accused is selected from among a group of persons unknown to the witness, and hence should have been considered of a highly assailable nature. People v. Deal, 357 Ill.634, 192 N.E. 649 (1934). Again we have not been convinced that this questionable element of the State's case was alleviated by the fact that the witness knew defendant beforehand as in People v. Ritcheson, 396 Ill. 146, 71 N.E.2d 30 (1947) inasmuch as the State's case here was but one dubious element built upon another.

Save the complainant's testimony, nothing otherwise appears of record linking defendant in time or place to the offense, nor did the State discredit his alibi relative to the incapacitating leg disease testimony, which if true, would have been incompatible with his alleged successful flight from the scene while alone carrying a cumbersome phonograph. The State now cites the very absence of corroborative evidence to impeach defendant's version of the case. This is, in effect, an appeal to the weakness of defendant's case rather than to the strength of their own, which, for reasons quite obvious, cannot be countenanced by our court. People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96 (1958). It however appears that this and related additional evidence would be equally available to both the prosecution and defense on a retrial of the issues.

Accordingly, and for the above reasons, the judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

BURKE, P. J., and MC NAMARA, J., concur.

50846

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY,
vs.	)	CRIMINAL DIVISION.
	)	
RICHARD BOCK,	)	Honorable Edward E. Plusdrak,
	)	Judge Presiding.
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Defendant, Richard Bock (age 28), was tried before a jury and convicted of the armed robbery of $2,642.00 cash, a camera and a deputy sheriff's star from the person and presence of the complainant, Dr. John Napier. A sentence was imposed upon defendant for a term of from not less than one (1) nor more than three (3) years in the State Penitentiary. Subsequent to the return of the jury's verdict, defendant presented motions for a new trial and in arrest of judgment, and again prior to the hearing in aggravation and mitigation interposed an alternative motion for a new trial or for judgment notwithstanding the verdict, all of which were denied by the court below, and from which denial he brings this appeal.

The defendant presents two issues for determination on review:

(1) Was there sufficient evidence to support defendant's conviction of the crime charged beyond a reasonable doubt?

(2) Was defendant's representation by counsel in the trial court proceedings of such an inferior caliber as to have deprived him of his constitutional guarantees to due process of law?

The complainant, Dr. John Napier, a practicing chiropodist, testified that on the evening of December 13, 1963, as he was attending to a patient in his offices located at 4952 Irving Park Road, Chicago, two men entered his waiting room, ostensibly in need of treatment of some foot disorder. One man was later identified by Napier as defendant, Bock, while the other was described as

a male, 5'4" in height, dark complected and wearing glasses. After an abbreviated stay, the pair exited from the premises to make a telephone call and failed to return that evening.

Three days thereafter, on December 16th, a different man identifying himself as Paul Schultz, and described by the doctor as about 25 years old, 6'2" tall, 165 lbs., with brown hair and a ruddy complexion, entered his office for treatment of an infected toenail. Once actually administered to, Schultz excused himself to go outside to his car for some money with which to reimburse the doctor. The time was approximately 7:20 P.M. Some twenty minutes later, Schultz returned accompanied by the same two men previously observed by Napier on December 13th. The doctor was alone. The trio each brandished revolvers, with the defendant announcing, "This is a stickup." Two confederates remained in the waiting room while defendant forced Napier into the operating room and seized a billfold from his possession. Defendant took $42.00 in cash from the billfold and cast it aside. A thorough search of the premises ensued whereby defendant succeeded in uncovering and confiscating twenty-six $100.00 bills hidden by the doctor in a nearby storage closet. Napier was then told to confine himself to the washroom and following his confronters' flight from the scene, emerged therefrom observing that his wallet which contained a Lake County Deputy Sheriff's badge (#717-C) and an Ansco flash camera atop his desk, had likewise been taken. He then called the police.

Thereafter, in the late evening hours of December 23rd, in a separate and unrelated incident, defendant and two companions, Henry Menicucci and Richard Bartoli, were apprehended by local authorities while attempting to burglarize a restaurant in Lake County, Illinois. Each of the offenders had sustained multiple bullet wounds in the altercation with the police which followed. State's witness Deputy Sheriff McCormick testified that the three were taken in custody, given a "light frisk" and placed in an

ambulance for transportation to a hospital.

Bartoli was strapped to a stretcher in the ambulance, while defendant, his wrists handcuffed together before him, was placed in the right side seat in the rear compartment of the vehicle facing two deputy sheriffs. The position occupied by defendant was described as resting immediately adjacent and between the stretcher and right exterior wall of the ambulance. Menicucci's precise placement in that vehicle does not appear. The two deputy sheriffs remained in the presence of defendant and his companions throughout their journey to the hospital. It would appear that the lights in the rear compartment of the ambulance had remained off. Deputy McCormick added that defendant's wrists were not so tightly handcuffed so as to bar access to his shirt and coat pockets.

Shortly thereafter, the ambulance driver, while cleaning the interior of his vehicle, discovered a Lake County Deputy Sheriff's badge (#717-C) secluded beneath the area where defendant had been seated. This badge was turned over to the Lake County Officials, subsequently identified by Dr. Napier as the one taken in the robbery, and introduced into evidence in the instant case as People's Exhibit No. 2. Testimony similarly disclosed that the trio had arrived at the scene of their burglary attempt in an automobile observed to have been driven by defendant and in which the arresting authorities discovered a black camera with flash attachment, later identified at trial by the complainant as the one seized from his possession and introduced into the record as People's Exhibit No. 1. Napier testified that he positively identified the camera because of a small piece of foam rubber he had inserted in its battery compartment.

On December 26th or 27th, the complaining witness was summoned to the St. Therese Hospital in Waukegan where these three men were being treated and confined in the same room and asked if

he could make any identifications relative to the armed robbery at his office. The doctor, by his own admissions, was able to identify only defendant, even though he had examined Menicucci's left foot for evidence of his prior treatment of the toe disorder. That single identification was later denied at trial by the testimony of both defendant and Menicucci who represented that Napier could recognize no one.

Testifying in his own behalf, defendant denied complicity in the robbery in every respect, denying as well, any knowledge relative to the discovery of the badge and camera. As to the badge, defendant stated he had been thoroughly searched and tightly handcuffed by the Lake County police to the extent of rendering the alleged disposition of it by him an impossibility. It was defendant's alibi that he had spent the evening in question constructing a barbecue at a lounge in Highwood, Illinois, owned by a Mr. Robert Evinger, where he remained until the following morning. Defendant acknowledged that he knew Evinger's home address, but conceded that he had made no attempt to subpoena him as a witness in his behalf.

Defendant conceded further that he and Bartoli (who he alleged did not answer to Napier's description) had been the two men observed in the complainant's waiting room three nights before the commission of the offense, admitting that it had been their intentions at the time to rob the doctor. He stated, however, that they became nervous, reconsidered and never returned to that area. Defendant stated that he was 5' 10-1/2" in height and weighed 315 lbs. on the date of the crime. He however admitted to have since dieted and reduced his weight by 40 lbs., adding that he has never weighed less than 225 lbs. in the last five to ten years.

Defense witness, Officer Starzinski, testified he was the first patrolman on the scene following the robbery. He, however,

could recall little of what had transpired, refreshing his memory and testifying by intermittent reference to the police report transcribed from the original notes he had taken (Defendant's Exhibit No. 1). The officer testified that the doctor had stated that he had been accosted by a lone man whom he identified as his patient, Paul Schultz, and described in terms answering to his previously noted physical characteristics. Starzinski stated that to his recollection, Napier failed to make mention or complaint of the loss of either the $2,600.00 or camera. On cross-examination however, the witness admitted to Napier's then apparent nervous condition upon his arrival minutes after the offense and the hurried manner in which such police reports are prepared. The officer admitted that he had never seen Defendant's Exhibit No. 1, at any time prior to the date of trial.

State's witness, Detective Thorniley, gave an account somewhat to the contrary. He stated that upon his arrival that same evening sometime after 8:00 P.M., the victim complained specifically of having been robbed by three white males whom he described as follows: (1) the former patient, Schultz, age 22 to 25, 165 lbs. and 6'2" tall; (2) a second man 22 to 25 years old with a heavy build and round face; and (3) a third man who was shorter but could not be described "too closely" by the doctor. Thorniley added that Napier had stated the stolen property to be $2,642.00 in cash, a sheriff's badge and a camera.

By his effort on appeal to impugn the verdict of the jury, defendant, with citation to numerous authorities, assails the vague and doubtful nature of Dr. Napier's identification on a twofold basis. Succinctly, as against his plausible alibi, defendant places the thrust of his argument upon the complainant's failure to mention his pronounced obesity as well as the identification's patent inconsistency with the information given Officer Starzinski. Upon a perusal of the record before us however, we cannot, without

giving a strained construction to the facts, justify a usurpation of the verdict of the jury in the instant case. Where there exists credible and substantial evidence upon which to found the verdict, it will not be set aside on review merely because there was other evidence which, if believed, would have resulted in a contrary verdict. People v. Smith, 63 Ill.App.369, 211 N.E.2d 456 (1965).

The complaining witness was twice afforded an opportunity for close and sustained observations of his confronter's identity under what can fairly be presumed well illuminated conditions. Defendant, in fact, admitted his presence in the office three nights before the offense. On the latter occasion, defendant was positioned in closest proximity to his victim, hence not at all unlikely to have his identity profoundly impressed in Napier's memory. The actual identification was first made but ten days later, as well as again at trial. Defendant does not, on appeal, attack the reliability of that identification because of the absence of a police lineup, but rather adheres to the proposition that Napier failed to recognize him or his confederates at the hospital.

The issue then bore directly upon the credibility attached by the jury to the accounts of the respective witnesses, and we cannot say the jury erred in believing the testimony of the doctor, under these conditions, over that of defendant and Menicucci. Napier's failure to recognize either Bartoli or Menicucci would furthermore not serve to cast doubt upon the credulity of his narration. Bartoli was placed at the scene only through defendant, he having been described by the latter as a man considerably taller than the person said to be accompanying defendant on the first occasion. Menicucci was discounted by the doctor only after his foot was examined for signs of the treatment administered to the man calling himself Paul Schultz. From all that appears, Napier maintained a conscientious desire to be positive in his identificatio

We similarly feel that the jury's decision to discredit the testimony of Starzinski was not an unwarranted one. His account was almost totally devoid of independent recollection and was predicated primarily upon a police report he had never theretofore examined or verified. That report moreover had been transcribed from notes taken immediately following the trauma of the event, under circumstances openly inviting errors of omission, an observation, we might add, strengthened by Napier's subsequent identification of the camera, which that report fails to mention. Conversely, defendant was shown to answer to the general description given to Detective Thorniley as the second man about 22 to 25 years old (defendant was 26 in 1963), with a heavy build and round face. Defendant was a sufficiently tall man to carry extra weight without striking contrast, and the exact extent of his obesity on the date in question, by his own testimony, was left somewhat open to conjecture.

In any event, the discrepancy possibly created by Napier's failure to comment on this accentuated obese feature was of insufficient moment to overcome the otherwise positive nature of his identification. People v. Terlikowski, 83 Ill.App.2d 307, 227 N.E. 2d 521 (1967) and People v. Nicholson, 55 Ill.App.2d 361, 204 N.E.2d 482 (1965). Defendant was not, as he implies, the third shorter man whom the witness could not describe "too closely." That remark appearing to have been intended as a reference to the man 5'4" tall (considerably shorter than defendant) who was present with him on both occasions at the office.

Nor can defendant successfully lodge objection to the introduction into evidence of the camera and badge upon the theory that they were not first shown to have been within his exclusive possession and control. Defendant confuses the rule of exclusive possession as it is employed to raise or destroy an inference of guilt, with the test of relevancy as it finds application in the

introduction of these two exhibits into evidence. Simply stated, that test is whether the exhibit in question fairly tends to prove the particular offense charged under circumstances which make the proposition in issue either more or less probable.

Here, the camera and badge, both of which bore distinctive identifying features, were offered as circumstantial evidence tending to corroborate the direct identification evidence of his guilt. Both were discovered seven days after the crime, in confined areas most closely proximate in time and place to defendant's movements. The issue raised relative to defendant's disposition of the badge in the ambulance was a factual question which we cannot say the jury improperly resolved. Defendant's complaint that other persons had equal access to the car and ambulance would affect only the credibility or value and not the competence of the respective exhibits. People v. Bryan, 27 Ill.2d 191, 188 N.E.2d 692 (1963); People v. Jones, 22 Ill.2d 592, 177 N.E.2d 112 (1961); People v. Moore, 74 Ill.App.2d 24, 220 N.E.2d 105 (1966); and People v. Smith, 63 Ill.App.2d 369, 211 N.E.2d 456 (1965). The exhibits were properly admitted. It is our conclusion accordingly that the sum of the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

A perusal of the proceedings in the lower court equally fails to support defendant's second contention relative to incompetence of counsel. Where, as here, an accused has employed counsel of his own choice, his conviction will not be upset merely because in retrospect it might appear that his attorney made some tactical error or was otherwise remiss in his duties. People v. Stephans, 6 Ill.2d 257, 128 N.E.2d 731 (1955). It presents a question answered solely upon the basis of the facts and circumstances peculiar to the case by which it arises. People v. Bailey, 76 Ill. App.2d 310, 222 N.E.2d 268 (1966).

Reflecting then upon the allegations of prejudice assigned

by defendant to certain actions of counsel at trial, we can find nothing of substance to denote incompetency of representation. Defendant in this regard points to counsel's asking of an absurd question, an outburst of shouting for which he was admonished and his failure to ameliorate the effects of People's Instruction No. 15, dealing with legal accountability. The burden of the issue however is upon defendant to establish actual incompetence of counsel with resulting substantial prejudice, which element of his case cannot be sustained by mere unsupported assertions of misconduct. People v. Palmer, 31 Ill.2d 58, 198 N.E.2d 839 (1964). To that end, a review of trial counsel's competence does not extend to those areas involving the legitimate exercise of his judgment, discretion or trial strategy, even though counsel on appeal, or the court, may have acted in a different manner. People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708 (1964); and People v. Palmer, 27 Ill.2d 311, 189 N.E.2d 265 (1963).

Counsel's vocal outburst was but momentary and isolated in nature. The interrogatory which defendant assails, by the benefit of hindsight might have been better left unasked, but it was by no measure damaging to the defense of his cause. People v. Robinson, 21 Ill.2d 30, 171 N.E.2d 11 (1960). As to counsel's failure to take steps to clarify the State's instruction on accountability, it would not appear to have affected the outcome in view of the otherwise convincing evidence of his guilt. Moreover, counsel tactically achieved the desired result through the direct and explicit testimony of defendant relative to his withdrawal from the scheme to rob the doctor, which assertions the jury could have considered as encompassed by People's Instruction No. 15.

Next, prejudice is claimed to have emanated from an accusation by counsel addressed to the Assistant State's Attorney in the corridor before the impanelling of the jury to the effect that racial criteria were being employed by the latter for the

excusing of prospective jurors during voir dire examination. The comment was deemed improper by the court, for which counsel was admonished outside the presence of the jury. The trial judge, however, considered the remark of insufficient moment to grant the State's motion for a mistrial. Counsel, in fact, denied that his accusation was overheard and agreed to dismiss any venireman who did happen to hear it. We agree with the State that defendant's basic position was not thereby jeopardized, for the prejudicial impact of this claim, if at all, would have militated to the prosecutor's disfavor at whom it was addressed and not the accused.

As his final contention, defendant levels claim to counsel's inadequate knowledge of the rules of evidence, which argument he predicates not upon counsel's failure to object, as is typically the case, but rather to counsel's inability to overcome the inappropriate objections by the State. The incident from which this point arises involved the repeatedly sustained hearsay objections by the State to the alleged statements made by one Orelia Hurst to defendant. Defendant alleges he has been particularly prejudiced because, as he asserts de hors the record, Orelia Hurst had set him up for an "ambush" in the Lake County incident and had taken steps to frame him for the instant offense.

With that contention, we cannot agree. Again the development was isolated. Moreover, by their most favorable construction, the alleged statements were but declarations against Orelia Hurst's penal interests which, unlike those against pecuniary interests, were not admissible as an exception to the hearsay rule, the case of People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952) notwithstanding. See Cleary, Handbook of Illinois Evidence, 2nd Ed. (1963) §17.22, pp.289-290. Suffice to say, the facts in Lettrich were somewhat dubious as to guilt as well as manifestly inapposite on the facts of the case at bar, the court therein qualifiedly stating:

> "We think under the special circumstances of the instant case justice demands a departure from the rule. . . ."

Counsel's failure to avail his client of the Lettrich rule would evidence, accordingly, no such incompetence.

The privately retained counsel in the lower court proceedings afforded defendant full and zealous representation. His duties were by no ascertainable indication discharged in a perfunctory manner. Objections by counsel appear throughout the record at the appropriate junctures, he twice interjected motions for directed verdicts, an eloquent closing argument was delivered in defendant's behalf and post-trial motions were presented on two occasions. Counsel for defendant proceeded even further to argue vigorously for probation during the hearing in aggravation and mitigation, emerging therefrom with some degree of success in view of the gravity of the offense involved.

For the above reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.